EARLE C. STREBE

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 85-19-A Decided March 21, 1988

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) upholding cancellation of Palm Springs Lease No. PSL-24.

Affirmed; recommended decision adopted.

1. Administrative Procedure: Burden of Proof--Indians: Leases and Permits: Generally

   In appeals under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

2. Indians: Leases and Permits: Generally

   When the language of a lease of Indian trust or restricted property is ambiguous, the intent of the parties must be ascertained by an examination of the circumstances surrounding the execution of the lease.

3. Indians: Leases and Permits: Development Leases--Indians: Leases and Permits: Violation/Breach: Generally

   Under the circumstances of this case, the lessee of Indian trust or restricted property breached the lease by failing to attempt in good faith to complete development of the leased premises.

4. Indians: Leases and Permits: Violation/Breach: Waiver of Breach

   Whether the acceptance of rent by an Indian lessor after default in specific provisions of a lease constitutes a waiver of the default is a question of the lessor's intent, which is determined on the basis of the facts of the particular case.

5. Indians: Leases and Permits: Generally

The construction of a contract approved by the Bureau of Indian Affairs on behalf of an Indian or Indian tribe is a question of Federal law. In the absence of Federal cases on point, state law may be used as an indication of the general common law.

6. Indians: Leases and Permits: Cancellation or Revocation

The Bureau of Indian Affairs is not required to give the lessee of Indian trust or restricted land a reasonable time in which to cure a breach of the lease when it is determined in accordance with 25 CFR 162.14 that the breach cannot be cured.

APPEARANCES: Allen O. Perrier, Esq., Palm Springs, California, for appellant; Wayne Nordwall, Esq., Office of the Field Solicitor, Phoenix, Arizona, for appellee; George Forman, Esq., Fresno, California, for lessor Frances Lucille Diaz Cummings.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Background

On January 28, 1985, the Board of Indian Appeals (Board) received a notice of appeal from Earle C. Strebe (appellant; lessee). Appellant sought review of a November 30, 1984, decision issued by the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) which upheld cancellation of Palm Springs Lease No. PSL-24, contract 14-20-550-730, between appellant and Frances Lucille Diaz Cummings (Cummings), Palm Springs Allottee No. 98, and Arthur Diaz, Jr. (Diaz), Palm Springs Allottee No. 104.

After reviewing the briefs submitted by appellant and Cummings, 1/ the Board determined that the matter should be referred to the Hearings Division of the Office of Hearings and Appeals for an evidentiary hearing and recommended decision. Strebe v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 111 (1986). The matter was assigned to Administrative Law Judge Harvey Sweitzer, who held a hearing on February 18-20, 1987. Judge Sweitzer issued a recommended decision on October 27, 1987.

Appellant exercised his right to file exceptions to the recommended decision. The Board received those exceptions on December 3, 1987. Cummings' response to appellant's exceptions was received on December 14, 1987. 2/

1/ Diaz has taken no part in any of these proceedings. Appellee did not participate in the initial proceedings in this appeal.

2/ The pertinent factual background of this case is set forth in the Board's decision at 14 IBIA 111 and Judge Sweitzer's recommended decision, and will not be repeated here.

Discussion and Conclusions

The Board has carefully reviewed the record created before Judge Sweitzer, the Judge's recommended decision, and the materials filed after the issuance of the recommended decision. Judge Sweitzer's recommended decision adequately sets forth and discusses the facts and law of this case, and the Board hereby adopts that decision which is attached to this opinion and incorporated by reference. 3/

The issues raised in appellant's exceptions were thoroughly considered and addressed in Judge Sweitzer's recommended decision. The Board finds appellant's exceptions merely show his dissatisfaction with the legal conclusions reached, and do not justify any modification of the recommended decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 30, 1984, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) is affirmed.

_____
Kathryn A. Lynn
Chief Administrative Judge

I concur:

_____
Anita Vogt
Administrative Judge

3/ The headnotes set forth in this opinion are indicated in the text of Judge Sweitzer's recommended decision.

United States Department of the Interior
Office of Hearings And Appeals
Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138-1194

October 27, 1987

| | | |
|---|---|---|
| EARLE C. STREBE, | : | Docket No. IBIA 85-19-A |
| | : | |
| Appellant | : | |
| (and Lessee) | : | Appeal from a decision |
| v. | : | of the Deputy Assistant |
| | : | Secretary--Indian Affairs |
| DEPUTY ASSISTANT SECRETARY-- | : | (Operations) upholding the |
| INDIAN AFFAIRS (OPERATIONS), | : | cancellation of Palm Springs |
| | : | Lease No. PSL-24 |
| Respondent | : | |
| | : | |
| FRANCES LUCILLE DIAZ CUMMINGS, | : | |
| | : | |
| Lessor | : | |

## RECOMMENDED DECISION

Appearances: Allen O. Perrier, Esq., Perrier, Dougherty & Cribbs, Palm Springs, California, for appellant-lessee;

Wayne C.. Nordwall, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for respondent;

George Forman, Esq., and Barbara E. Karshmer, Esq., Alexander & Karshmer, Berkeley, California, for lessor.

Before: Administrative Law Judge Sweitzer.

## Procedural and Factual Background

By opinion dated May 21, 1986, the Interior Board of Indian Appeals (hereinafter "the Board") referred this matter to the Hearings Division in accordance with 43 CFR 4.337(a) and 4.338. Strebe v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 111 (1986).

Mr. Earl C. Strebe, appellant herein, and sometimes styled “lessee,” contests the decision dated November 30, 1984, issued by the Deputy Assistant Secretary--Indian Affairs (Operations), respondent herein, upholding the cancellation of lease No. PSL-24 between Mr. Strebe and Ms. Frances Lucille Diaz Cummings, lessor herein, and sometimes styled “Cummings”, Palm Springs Allottee No. 98, and Arthur W. Diaz, Jr., 1/ Palm Springs Allottee No. 104, both of whom belong to the Agua Caliente Band of Mission Indians. A hearing on the record in this matter was held February 18, 19, and 20, 1987, in Palm Springs, California, following a prehearing conference off the record which was held in Palm Springs the afternoon of February 17, 1987. Posthearing briefs were filed by all parties, with the final brief being received on July 6, 1987.

The evidentiary record in this matter includes

- the three-volume transcript of the hearing;

- Appellant's exhibits 1-6 and 8-15;

- Lessor's exhibits 1-7, 9-15 and 18;

- Respondent's exhibits 1-3;

- Tabs A-Z and AA-DD of the Administrative Record used by respondent in reaching the decision appealed from (cited as "A.R. tab __”; see Tr. 12-21, 25);

- Exhibits A-L attached to the declaration of Richard McDermott that was incorporated in Appellant Earl C. Strebe's Opening Brief (blue cover; submitted to the Board July 1985; cited as "Declaration Exh.___”; see Tr. 130-132, 152);

- Exhibits 2, 15, 16, 19, 21, 27-30, 36, 39 and 40 to Lessor Frances Lucille Diaz [Cummings]' Brief in Opposition to Lessor's [sic] Appeal, which is signed by George Forman and dated

1/ Arthur W. Diaz, Jr., is not a party to these proceedings. He has never been represented by lessor Frances Cummings' attorneys, Barbara Karshmer (Tr. 484) and George Forman (Tr. 493-494). Notices relating to this proceeding were sent to him but were returned unclaimed (Tr. 493).

September 5, 1985 (cited as "Diaz' Brief Exh. ___"; see Tr. 293-303, 329); and,

- Exhibits 12, 13 and 16-19 to Appellant Earle C. Strebe's Opening Brief (blue cover; submitted to the Board July 1985; cited as "Strebe's Brief Exh. ___"; see Tr. 330-331).

The subject business lease, which was approved by the Bureau of Indian Affairs (hereinafter "the Bureau" or "BIA") on October 7, 1959, was negotiated on behalf of the lessors, then minors, by Mrs. Beverly Diaz (lessors' mother) and Eugene E. Therieau, 2/ acting as co-guardians. It covers 40 acres, more or less, of Indian trust land which was located in unincorporated Riverside County, California, at the time the lease was approved, but which was annexed by the City of Palm Springs shortly thereafter. The leased property consists of two contiguous parcels described in the lease as follows:

PARCEL A - Allotted to ARTHUR W. DIAZ, JR., P.S. 104

The South half of the Northwest quarter of the Northeast quarter of Section 20, Township 4 South, Range 5 East, San Bernardino Base and Meridian, containing twenty (20) acres, more or less, subject to existing rights-of-way.

PARCEL B - Allotted to FRANCES LUCILLE DIAZ [CUMMINGS], P.S. 98

The North half of the Northwest quarter of the Northeast quarter of Section 20, Township 4 South, Range 5 East, San Bernardino Base and Meridian, containing twenty (20) acres, more or less, subject to existing rights-of-way.

A.R. tab B, Lease Article 1, as amended by the Approval of Lease, A.R. tab B.

The property is located near the Palm Springs airport in the floodplain of the Whitewater River Channel and is subject to

2/ Mr. Therieau, then an attorney practicing in the City of Palm Springs, is now deceased (Tr. 118-119).

airport noise and "blow sand" problems. 3/ Parcel A includes a 660-foot frontage on Crossley Road; Parcel B has both a 660-foot frontage on Crossley Road and a 1320-foot frontage on Ramon Road. Although each parcel contains 20 acres, more or less, it was determined that lessor Cummings would have an undivided 3/5 interest in the lease proceeds and lessor Diaz would have an undivided 2/5 interest (A.R. tab A; A.R. tab B, Lease; Diaz' Brief Exh. 2).

The lease provides for a term of 25 years, renewable for another term of 25 years at lessee's option. Under the amendments set forth in the Approval of Lease executed on October 7, 1959, the terms and provisions for the renewal period are to be the same as those in force at the end of the first 25-year term (A.R. tab B, Approval of Lease § 3).

The lease clearly contemplated the eventual development of the entire 40 acres. Article 2 provides for both a minimum annual rent and for a percentage of lessee's gross receipts from all facilities on the property. Article 2 also acknowledges that lessee initially intended to develop only a drive-in theater on 10 acres of the demised premises, but Article 17 requires lessee to diligently attempt to keep the entire premises in use and Article 4 requires the submission of a general plan of development for the entire premises and (in two separate places) also requires a good faith attempt to complete development of the property within 3 years (A.R. tab B, Lease).

At the time the lease was being negotiated, the City of Palm Springs indicated that it objected to the construction of the theater, but it agreed not to protest the issuance of a permit if it were allowed to annex the property (Tr. 348-349).

Upon annexing the property, Palm Springs placed it in a restrictive guest ranch zoning classification, GR-5, with a prefix "W" indicating watercourse problems (Tr. 240-241; Appellant's Exhs. 10, 11). In 1973, the property was rezoned 0-5, an even more restrictive open space category, and the watercourse prefix was retained (Tr. 241; Appellant's Exh. 12). In 1980, the property was rezoned to a light industrial designation, M-1 (Tr. 140, 193). To date, there has been no development on the property other than the drive-in theater, which was finally completed in

3/ Richard Smith describes blow sand and the problems it causes at Tr. 269-270.

1964 at a cost of approximately $300,000.00 (Tr. 359, 367-368, 369-370; Lessor's Exh. 14).

During the course of the lease, appellant was warned numerous times that he was not in compliance with his Article 4 obligation to submit a general development plan for the property. In a letter dated June 30, 1960, Director Jackson of the Palm Springs Office (PSO) gave appellant 10 days in which to show cause why the lease should not be canceled (A.R. tab D). The course of correspondence continued over a period of years to note appellant's failure to submit a development plan. A second show cause letter issued from Acting Sacramento Area Director Morlock on May 28, 1974, (A.R. tab R) and a 60-day notice of default issued from the Area Director dated July 15, 1974 (A.R. tab U). Rather than canceling the lease at that time, however, the Bureau granted appellant a 30-day extension (A.R. tab W), after which it took no further affirmative action against appellant until 1983.

The Board summarized the genesis of the present proceeding as follows:

> The present appeal arose in September 1981 when Cummings requested BIA to issue appellant a 10-day notice to show cause why the lease should not be terminated under 25 CFR 162.14. * * * The PSO requested an opinion from the Riverside Field Solicitor (Field Solicitor) on the legality of cancelling the lease. By memorandum dated February 19, 1982, the Field Solicitor informed PSO that, in his opinion, certain sections of the lease were ambiguous, and concluded the record available to him was factually insufficient to support cancellation of the lease.
>
> On April 27, 1982, PSO advised Cummings that BIA would not initiate cancellation proceedings. Cummings appealed the decision to the Area Director who, on March 11, 1983, reversed PSO and found appellant in breach of the lease. The Area Director gave the parties 60 days in which to attempt to reach an agreement regarding the undeveloped 30 acres. He further stated that if an agreement was not reached in 60 days, he would assist Cummings in cancelling the lease, in accordance with Article 15 of the lease.
>
> The parties met on May 3, 1983, in an attempt to reach an agreement. Because Cummings believed

> appellant's development proposals were too general and nonspecific, she informed BIA on May 8, 1983, that no agreement had been reached, and again asked BIA to cancel the lease. Appellant was not informed of this request until June 13, 1983, after several inquiries about Cummings' intentions following the May 3 meeting.
>
> On August 2, 1983, the Area Director advised appellant his lease was canceled effective that date and he must surrender possession of the premises. Appellant appealed this decision to appellee who, on November 30, 1984, affirmed the Area Director.

Strebe, 14 IBIA at 113-114 (footnote omitted). Thereupon, appellant appealed respondent's decision to the Board, which referred the matter to this office for a fact-finding hearing and recommended decision.

## Issues to be Decided

The issues before me to be decided are whether or not the Bureau correctly determined Mr. Strebe to be in breach of the lease and, if so, whether or not the Bureau's cancellation of the lease was procedurally proper.

## Burden of Proof

[1] In this proceeding appellant bears the ultimate burden of persuasion. It is well settled that

> In appeals brought to the Board under 25 CFR Part 2, the burden of proof is on the appellant to show that the action complained of was erroneous or not supported by substantial evidence. Cheyenne-Arapaho Tribes of Western Oklahoma v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 54, 90 I.D. 61 (1983); Hazel Hawk Visser v. Portland Area Director, 7 IBIA 22 (1978).

Walsh Logging Co., v. Portland Assistant Area Director (Economic Development), 11 IBIA 85, 113, 90 I.D. 88, 103 (1983). In light of the dicta set forth in Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984), appellant's burden is to establish by a preponderance of the evidence that the decision complained of was legally deficient.

Pertinent Lease Provisions

The Lease provides in pertinent part:

BUSINESS LEASE

* * * * * *

2. RENTAL:

* * * * * *

(2) The Lessee presently contemplates using ten (10) acres of said demised premises for the purpose of constructing and conducting thereon a drive-in theatre, which said theatre shall cost not less than One Hundred Fifty Thousand Dollars ($150,000.00) * * *.

* * * * * *

4. GENERAL DEVELOPMENT PLAN:

Within one hundred twenty (120) days after the approval of this lease, the Lessee shall cause to be prepared and submitted to the Lessors and the Area Director for their approval, a general plan and architect's design for the improvement and development of the property as a whole. Neither the Lessor nor the Area Director shall unreasonably withhold approval and they shall approve or state their grounds for disapproval within sixty (60) days after said plans are presented to them by the Lessee. Lessee will in good faith attempt to complete the development of the leased premises in accordance with the approved general plan within the first three (3) years of the lease. In like manner, any improvements to be constructed upon the demised premises at a later date, shall be subject to the approval of the Lessors and the Area Director. In any event, before the Lessee commences any construction of improvements on the demised premises, the Lessee shall submit to the Lessors and the Area Director, comprehensive plans and specifications for the then proposed improvement, who shall approve them if they conform to the general development plan hereinabove required, and, in addition thereto, Lessee shall give Lessors ten (10) days advance notice in writing of

intention to begin construction in order that Lessors may post non-responsibility notices, as provided in California Code of Civil Procedure, Section 1183.1, as amended.

As a material part of the consideration for this lease, Lessee will in good faith attempt to complete the development of the leased premises in accordance with the approved general plan within the first three (3) years of the lease.

Lessee covenants and agrees, within the first five (5) years of this lease, that at no cost and expense to the Lessors he will cause to be constructed and thereafter maintained upon the leased premises at all times during the term of this lease permanent improvements having a cost and reasonable worth and value of not less than one Hundred Fifty Thousand Dollars ($150,000.00).

* * * * * *

15. DEFAULT BY LESSEE - FORFEITURE

Time is hereby declared to be of the essence of this lease. * * * [I]n the event Lessee shall default in the performance of or shall breach any other covenant, condition or restriction of this lease [besides the payment of money] herein provided to be kept or performed by the Lessee, and if such default or breach shall continue uncured, or as to any default not entirely curable within that time, without the Lessee having reasonably begun and having diligently and continuously carried on the curing thereof, so far as possible, within a period of sixty (60) days from and after written notice thereof by Lessors to Lessee, (during which * * * 60-day period * * * Lessee shall have the privilege of curing such default or breach), then and in any such event, Lessors, at their option, may declare this lease forfeited by giving the Lessee written notice thereof, and upon such forfeiture Lessee shall thereafter have no further rights or interest hereunder or in or to the leased premises or any part thereof, and Lessors may reenter and take possession of the leased premises and all buildings and improvements thereon, and may oust therefrom the Lessee and all persons claiming under the Lessee* * *.

* * * * * *

17. USE OF PREMISES BY LESSEE

* * * * * *

Lessee agrees that at all times during the term of this lease, he will diligently attempt to keep the demised premises and all parts thereof, actively used.

A.R. tab B, Lease (emphasis added).

Discussion and Findings

I. Circumstances Surrounding the Lease

Article 4 of the lease specifically requires lessee, within the first 120 days following approval of the lease, to submit a plan "for the improvement and development of the property as a whole" to the lessors and the Area Director for approval, which is not to be unreasonably withheld (A.R. tab B, Lease). Grounds for any disapproval are to be stated within 60 days following the submission of these plans. The article further contains two independent development requirements: (1) that lessee, within the first 5 years of the lease, will construct and maintain, at his own expense, permanent improvements reasonably valued at not less than $150,000.00; and (2) that he will make a good faith attempt to complete development of the entire leased premises within the first 3 years of the lease according to the approved general plan (A.R. tab B, Lease).

Article 4 of the lease also makes appellant's good faith effort to complete development of the property a material part of the consideration for the lease (A.R. tab B, Lease). It is uncontested that appellant did not submit a general development plan, until at least July 15, 1974 (Appellant's Opening Brief, dated April 15, 1987, at 8, 20; see also Tr. 396-397). This is well after both the first 120 days of the lease, in which it was due, and the first 3 years of the lease, in which performance of the good faith attempt to complete the development was required. Appellant contends, principally, that he did act in good faith and that he therefore has breached neither his obligation to develop the entire property nor his obligation to submit a general plan. The Riverside Field Solicitor opined:

> The question of what constitutes a "good faith attempt" is subjective, and is also somewhat ambiguous as the term is used in the lease. The phrase leads one to believe that all that is necessary is that the Lessee attempt to complete development. Good faith is a question of fact and we are in no position with the information available, to make a judgment as to the Lessee's good faith attempt or lack thereof to develop.

Diaz' Brief, Exh. 30 (emphasis in original). The Board concurred with the Field Solicitor's assessment. Strebe, 14 IBIA at 116.

[2] Because the language of the "good faith" clause is ambiguous, the provision must be interpreted in light of the circumstances surrounding the lease. Id.

> Generally, if it appears there is an ambiguity in the provisions of a leasing agreement, the intent of the parties must be ascertained by examination of the circumstances of the lease: this rule applies to leases of Indian lands.
>
> Thus, the negotiations for the lease, the leasing agreement itself, and the subsequent events * * * determine the rights of the parties * * *.
>
> It is axiomatic that it is proper in evaluating leases of Indian trust lands to consider all the attendant circumstances surrounding the negotiation and execution of the agreement to ascertain the intentions of the parties to the lease when determining their relative rights.

Small v. Commissioner of Indian Affairs, 8 IBIA 18, 22 (1980) (footnotes omitted).

Determining whether or not appellant did act in good faith may depend, therefore, upon whether the parties anticipated the restrictive zoning of the property by the City of Palm Springs following its annexation and, if so, how that anticipation affected their expectations for the development of the property and the meaning of the good faith clause. Determining whether or not appellant did act in good faith may depend also upon the actual circumstances of zoning and appellant's attempts (if any) to develop the entire property following its annexation by the City of Palm Springs.

A. Annexation

The Bureau knew and acknowledged from the outset of the lease that the land would be annexed by the City of Palm Springs shortly after the lease was approved. That knowledge formed the basis for the atypically early approval of the drive-in theater plans.

By letter dated August 14, 1959, PSO Director R.W. Jackson informed the Sacramento Area Director:

> The City of Palm Springs has instituted proceedings to annex all of Section 20 into the City Limits. Upon annexation the property will be thrown into what is known as a Guest Ranch zoning for a period of one year. This, for all practical purposes, would prevent the development of the property during that period. The Lessee has already obtained clearance for the construction of the Drive-In Theatre on this property from the County of Riverside, and it is his desire that construction of such Drive-In Theatre be commenced prior to the time that the City's annexation of the area becomes effective. It is felt that if the project is under construction at the time of annexation, there would be little that the City could do to prevent its completion. We have been requested by the Lessee, as well as the Lessor, to process this lease as promptly as possible due to these circumstances, and your cooperation in this regard would be sincerely appreciated.

A.R. tab A.

By letter of October 15, 1959, Director Jackson advised Mr. Strebe:

> Normally we expect the general development plan to be submitted and approved before comprehensive plans for any particular improvement are submitted. However, in this case because of the difficulties connected with the annexation of this property and your desire to proceed with construction of the Drive-In Theatre at the earliest possible date, we have deviated from normal procedure in approving these plans. <u>The approval is based on the condition that you submit within the time specified in the lease an acceptable development plan for the premises as required by Article 4.</u>

A.R. tab C (emphasis added). Mr. Jackson explained:

> This lease was brought into us with the proposition that they were anxious to go ahead with development here and get it done before a city annexation was to take place. Apparently there was some understanding that if the city annexed the property, it went into kind of a holding zone for a period of time that would delay development for a year or so, so they wanted to get started on this development before the annexation took place, * * *.
>
> * * * * * *
>
> In this case, because of this anxiety and in order to accommodate the Lessee we went ahead and approved the specific plan for this drive-in theater without getting the general development plan submitted with the understanding that they would submit that within the times specified in the lease.

Tr. 96-97.

Mr. Strebe and Mr. Therieau also knew that the property would be annexed by Palm Springs, apparently in return for the city's acquiescence in the development of a drive-in theater on the site (see Tr. 348-349, 374).

B. Expectations: Restrictive Zoning and Development

The expectations of the parties upon entering into the lease agreement are more than customarily difficult to determine in this case. Negotiations took place some 28 years ago, presenting a challenge to the accuracy of the parties' memories. The difficulty is exacerbated by the death of lessors' co-guardian, attorney Therieau, whose office prepared the lease (Tr. 106) and who largely dealt with the negotiating parties separately rather than having them deal face-to-face.

The Bureau's participation in negotiating the lease, as described by Mr. Jackson, was limited:

> Q. [By Mr. Nordwall] * * * [W]hat was the role that you played in the leasing process here in Palm Springs?

> A. [By Mr. Jackson] Well, basically, * * * our role here in Palm Springs was to advise the Indians or their representatives during the negotiation process as to what was required; what would be acceptable and to make recommendations to the Area Director in Sacramento or to the Commissioner's Office in some rare cases where it required that level of approval as to whether the lease should be approved or not.

Tr. 87.

Mr. Jackson categorized the lease as a business development lease, the purpose of which was "to get the land developed and to produce income commensurate with it's [sic] value" (Tr. 88). It was based on a working form maintained by the Bureau, and contained a standard good faith clause (Tr. 106-107). As previously noted, the BIA approved the lease with the realization that at least some delay in development would result from the Palm Springs annexation. But the Bureau also expected that the entire property would be developed within a reasonable period of time (Tr. 94-95, 122-123). As Mr. Jackson put it: "[I]t's absurd to suggest that we would have recommended approval of a lease on 40 acres with the intent that only 10 acres would be developed" * * * (Tr. 123).

Mrs. Beverly Diaz, mother of the lessor, testified to having extensive discussions with Mr. Therieau over a month before signing the lease (Tr. 440). Her understanding of Mr. Strebe's development obligations was quite literal, and she expected that most of the property would be developed within 3 years and, in any event, the entire property would be developed within 5 years (Tr. 443-446). She also believed Mr. Strebe planned to develop a shopping center on the property, based on a discussion she overheard between appellant and attorney Therieau at a meeting in Mr. Therieau's office:

> Q. [By Mr. Perrier] And what was said relating to a shoping center? By whom?
>
> A. [By Mrs. Beverly Diaz] Well, the discussion was between Mr. Therieau and Mr. Strebe, and they were just talking about, you know, that is what they would like to put on there, a certain length of time after the fee was put up.
>
> Q. But one of the plans would include a shopping center?

A. Yes.

Tr. 461.

Mrs. Diaz admitted that she was aware that the property was restrictively zoned and that the property would require flood protection in order to be developed. No evidence was adduced, however, to show whether she had any knowledge prior to annexation that the property would be so zoned or what, if any, effect such knowledge may have had on her expectations for development.

Mr. Strebe testified to an entirely different set of expectations. Prior to signing the lease, his intention was solely to develop an outdoor theater on the property (Tr. 342-343, 345, 412). He anticipated no impediment to developing the theater because the city agreed to withdraw its opposition to the theater in exchange for acquiescence to its annexation of the property (Tr. 348-349, 373-374). Furthermore, Strebe professes not to have known that annexation would result in any restrictive zoning of the property (Tr. 374).

Mr. Strebe leased a parcel nearly four times the size of the lot he needed for the drive-in simply because it was offered as a package (Tr. 367) and perhaps because of its potential for future development. "I have always dreamed and planned to develop the property to its fullest and highest and best usage" (Tr. 433; see also Tr. 367, 375).

Appellant asserts that the lease gave him 5 years within which to develop the theater (Tr. 345) and that he complied with that requirement. Mr. Strebe testified on cross-examination that he believed he had an indefinite time within which to develop the rest of the property (Tr. 379), but that he had no definite intention to do so:

> Q. [By Mr. Foreman] Is it your testimony that when you signed PSL-24, you had no intention of completing development of the 30 acres not needed for the drive-in theater within the first three years of the lease?
>
> A. [By Mr. Strebe] I had no intention. No. Not the first three years. I had hoped that the property would develop to where we could develop it commercially and to its best and highest usage.

Q. Is it your testimony that when you signed PSL-24, you had no intention of completing development of the 30 acres not needed for the drive-in theater within the first five years of the lease?

A. Yes, sir.

Q. Is it your testimony that when you signed PSL-24, you had no intention even of beginning development of the 30 acres not needed for the drive-in theater within the first three years of the lease?

* * * * * *

A. Sir, it didn't enter my mind. Had somebody come with a proposition, I would have run to the City offices and tried to get permission to build.

Q. Is it your testimony that when you signed PSL-24 you had no intention even of beginning development of the 30 acres not needed for the drive-in theater -- excuse me -- of the land not needed for the drive-in theater, within the first five years of the lease?

A. Sir, if I remember the first five years, I had a breathing spell of five years.

* * * * * *

Q. So your answer is, yes, it was not your intention to even attempt even to begin development of the balance of the property within the first five years, is that right?

A. I had no idea when I would start, sir. I knew I had the right with the lease.

* * * * * *

Q. As you understood PSL-24, how long did you have to begin or attempt the completion of development of the land not required for the drive-in theater?

A. I didn't have a time frame. * * *

Tr. 376-379.

Subsequently, Mr. Strebe endeavored to amend this testimony as follows:

> Q. [By Mr. Nordwall] Correct me if I am wrong, but I believe yesterday that you testified that when you initially signed this lease, that you never intended to do anything with the development of this land except construct the drive-in theater. Is that correct?
>
> A. [By Mr. Strebe] If I said that, that is not correct.
>
> I have always dreamed and planned to develop the property to its fullest and highest and best usage, and I added that I was never permitted to. * * *
>
> Q. So you have always been aware that development was a critical element of this lease then?
>
> A. Yes, indeed. Daily.
>
> Q. You just stated again -- reiterating what you stated yesterday -- that it has always been your intent to develop this property only to its highest and best use. Is this correct? [emphasis added]
>
> A. For the benefit of the landlord and it would certainly benefit me as a tenant.
>
> * * * * * *
>
> Q. Is it your opinion that an RV park which I believe is the central element of your plan, is that the highest and best use of this property?
>
> A. In the rear, yes. Economically for all concerned and the highest income, yes.
>
> Q. Is that --
>
> A. And, sir, if I may add, it's a usage that can easily be moved away for better and higher development. As an interim income, it would be most advantageous.

Q. That was going to be my next question. Is it the highest and best use only because you have 23 years remaining on the lease?

A. That may be today, yes. * * *

Q. So in other words if there were a longer rental term available, you could make a better use than an RV park?

A. Oh, I'm sure of that. Yes. I'm sure of that.

Tr. 433-436.

Thus, the expectations of appellant, lessor Cummings (through her co-guardian), and the BIA were in conflict from the beginning. While lessor expected strict conformance to the literal language of the lease, appellant believed his immediate commitment was only to construct a theater, with other development to follow only at such time as it could be beneficially and remuneratively accomplished. The Bureau foresaw that some delay in developing the property would occur when the City of Palm Springs annexed the property, but underestimated the duration of the anticipated hiatus. As time passed and the promised development failed to materialize, the positions of lessor Cummings and appellant became polarized, resulting in lessor's complaints to the Bureau. However, the BIA's reluctance to confront the City in its arguably illegal exercise of zoning authority (discussed infra) afforded lessor little relief and appellant little incentive.

C. Circumstances Following Annexation

1. Zoning: Restrictions on Development

The WGR-5 zone (restrictive guest ranch, watercourse problems) initially imposed on the property was maintained until 1973. Opportunity for development during that period was hampered by the remoteness of the land from the central city and its proximity to the airport; the available conditional uses required a hearing and decision by a zoning board whose general policy was to control growth rather than to foster development (Tr. 246-247). When the land was rezoned WO-5 (restrictive open space, watercourse problems) in 1973, development was still largely precluded by the limitations of the zone, the predilections of the zoning board, and the location of the property.

Richard J. Smith, Palm Springs Planning Director at the time of the zoning change, testified:

> The O-5 was a zone that was created for areas of concern to the City such as areas within the influence of the airport or areas that were subject to blow sand; areas that were remote where the infrastructure [sic] did not exist. You could somewhat refer to it as a holding zone because of its limitations, especially density-wise, and the thought was that if some of the problems that existed in these areas zoned for O-5 could be eliminated, then the zoning could be reconsidered.

Tr. 243.

Richard S. McDermott, Director of the BIA's Palm Springs Office from 1972 to 1984, also clearly regarded both the GR-5 and O-5 classifications as holding zones: "First it was, when I came here [in 1968], it was Guest Ranch, which is sort of a holding zone. Then after the 1973 re-zoning and down-zoning, it was a WO-5, which was also a holding zone" (Tr. 139).

John Wessman, a developer who served on the City's planning commission from 1970 to 1976 (Tr. 212), testified that the City of Palm Springs

> went from being a city that was growing rapidly to the late '60's/early 70's, they got very concerned about growth and they went through and had a whole new general plan based strictly on trying to control the growth, control the population, control the traffic and et cetera, et cetera, and so there was a very difficult time between the early '70's and the late '70's to develop or try to rezone property in Palm Springs.

Tr. 225-226.

Planning Director Smith testified, "I think the proximity of the property to the airport would have precluded any type of residential development other than what was strictly allowed under the zoning ordinance" (Tr. 249). He further testified:

> I had indicated on several occasions that I could not recommend for a shopping center in that area because I felt that it was too remote and that there was not the market feasibility for such a

> center, indicated that in order for the applicant or for any kind of a change to a neighborhood shopping center, they would have to submit market studies justifying a market for such use, and I didn't believe at the time it existed.

Tr. 250.

Appellant and his representatives had many discussions with Richard Smith during Mr. Smith's tenure as Assistant Planner and then Planning Director for the City of Palm Springs. Mr. Smith consistently discouraged the idea of rezoning. As Mr. Smith testified, "The discussions generally were, at least on my part, to reaffirm the zoning that applied to the land and to generally indicate that in my opinion, any change of that particular zoning would be most difficult, or would be very difficult to obtain" (Tr. 245-246). In fact, zoning applications by other parties with similarly situated land were denied by the planning commission. According to testimony by William Foster, a member of the planning commission during the early years of the lease, the council denied an application for a mobile home park on property "to the west of and just across Crossley Road from Mr. Strebe's property on the same side of the street" (Tr. 202). Mr. Wessman recalled another proposal for a mobile home park in the vicinity of the Strebe parcel which was also denied by the planning commission (Tr. 221-222). He further testified that the 40-acre parcel abutting the Strebe parcel to the west, known as the "old auto center property," failed to develop even after the property was improved:

> They put the improvements on Ramon Road and they did the interior improvements to the streets and they improved half of Crossley Road and half of Sunny Dunes and half of San Luis Rey, but that's as far as it -- no commercial buildings or buildings of any kind have been built on the property.

Tr. 214.

The property continued to be zoned WO-5 until 1980, 4/ when the area was rezoned M-1, light industrial, which would permit commercial development. It is not clear whether or not the watercourse designation continued, but presumably it has.

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4/ Appellant asserts in his brief that the zoning change to M-1 occurred in 1981. Appellant's Opening Brief, dated April 15, 1987, at 7; cf. Tr. 140, 193.

2. Zoning: Legal Authority.

The trust lands of the Agua Caliente Band of Mission Indians consist of alternate square mile parcels forming a checkerboard with like parcels of non-Indian lands. By the middle of the twentieth century, Congress determined that growth in population and land development "makes desirable extension of State civil jurisdiction within their borders * * * to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property * * *." H.R. Rep. No. 848, 83d Cong., 1st Sess.; quoted in S. Rep. No. 699, 83d Cong., 1st Sess.; reprinted in 1953 U.S. Code Cong. & Ad. News 2409, 2412. Thus Congress enacted P.L. 280 Act of August 13, 1953, ch. 505; 67 Stat. 589, as amended; 18 U.S.C. § 1162; 28 U.S.C. § 1360.

P.L. 280 provided, on the one hand, that "those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory * * *." 28 U.S.C. § 1360(a). On the other hand, it also provided that "[n]othing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property * * * belonging to any Indian * * *." 28 U.S.C. § 1360(b) (emphasis added).

Following the enactment of P.L. 280, the City of Palm Springs took the position that its zoning ordinances applied to Indian trust lands located within the city limits.

At least until 1962, when Mr. Jackson left the Palm Springs Office of BIA, the Bureau was ambivalent as to the applicability of local zoning ordinances to Indian land:

> Q. [By Mr. Nordwall] During this time period, did the Bureau have a policy or position on the applicability of city zoning to Indian lands?
>
> A. [By Mr. Jackson] Yeah, there was a very ambivalent position. The official position of the Bureau of Indian Affairs was that neither the city nor the county had any authority to zone, regulate building or even annex Indian lands. However, everyone realized that for the best development of Indian land, it was necessary to have some kind of what would amount to zoning control and building regulation and so forth and it was obvious, and in that point of time that the Bureau of Indian

> Affairs did not have the capability to perform that function and neither did the tribe, so that as an accommodation and without drawing the issue, as long as the city's regulation zoning ordinances and building regulations appeared to be reasonable, everybody went along with them because it was the best thing that was available at the time * * *.

Tr. 99-100.

Mr. Jackson further noted that the reason for the Bureau's initial approval of the lease outside normal BIA procedure was to avoid challenging the city's exercise of authority:

> Q. [By Mr. Foreman] When you recommended approval of this lease, did you consider the city's zoning laws to be a substantial impediment to the development of this property?
>
> A. [By Mr. Jackson] Well, the reason that the lease was handled the way it was -- rushing through with the approval and so forth, -- was to avoid the problems that might be created if the city had access [sic] property and imposed some kind of zoning which would either have to be abided by or we would have to, at that time, throw down the gauntlet and challenge the authority of the city to zone which I don't think anybody was prepared to do at that point.

Tr. 123-124.

In 1965, the Agua Caliente Band filed suit in U.S. District Court seeking to enjoin the City of Palm Springs from applying its zoning to Indian trust lands. The following year the suit was compromised by stipulation that the Bureau would adopt Palm Springs' zoning ordinances, with certain exceptions not pertinent to this proceeding, and make them applicable to Indian trust lands. Agua Caliente Band of Mission Indians Tribal Council v. City of Palm Springs, No. 65-564-MC (S.D. Cal. April 12, 1967) (final judgment dismissing action pursuant to stipulation); Lessor's Exh. 12. See 25 CFR 1.4 (1965); 30 FR 8172 (June 1965) (adopting and applying Palm Springs zoning to Agua Caliente lands); Respondent's Exhs. 1 and 2.

In 1971 the Agua Caliente Band again filed suit in U.S. District Court for declaratory relief from the application of Palm Springs' zoning. Agua Caliente Band of Mission Indians Tribal Council v. City of Palm Springs, 347 F.

Supp. 42 (C.D. Cal. 1972). The court held, inter alia, that "the City's zoning ordinances apply to and are enforceable upon Indian lands to the same extent and with the same effect as they are enforceable upon non-Indian lands." Id. at 53. The decision was vacated, however, by the Ninth Circuit Court of Appeals in an unpublished order dated January 24, 1975. See Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 667 (9th Cir. 1975).

Subsequently, in a separate case, the same Court of Appeals determined that, contrary to Palm Springs' position, P.L. 280 did not authorize the application of local zoning ordinances to Indian trust land. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), reh'g and reh'g en banc denied (1976), cert. denied sub nom. Kings County v. Santa Rosa Band of Indians, 429 U.S. 1038 (1977). The court held that "the County is without jurisdiction to enforce its zoning ordinance [on the reservation] * * * unless such jurisdiction is explicitly granted by P.L. 280, 28 U.S.C. § 1360. We hold, for a number of alternative reasons, that P.L. 280 does not confer such jurisdiction." Id., 532 F.2d at 659.

Effective June 28, 1977, the Secretary of the Interior revoked the application of Palm Springs' zoning ordinances to Agua Caliente lands. 42 FR 32851 (June 28, 1977); Respondent's Exh. 3. Thus, as of that date, the City's zoning should no longer have been a legal impediment to developing the leased property. 5/

3. Zoning: Attempts to Develop the Property

Following approval of the lease in October 1959, appellant had 120 days within which to submit a plan for the development of the entire property (A.R. tabs B, C). Such a plan was a necessary prerequisite to undertaking development of the entire property, which development Mr. Strebe was to attempt in good faith to complete within 3 years.

5/ Appellant's attorney attempted to question Palm Springs Office Director McDermott about an alleged contract between the City and the Tribal Council entered in 1977, subsequent to the Santa Rosa decision, regarding the resolution of zoning issues. Lessor's attorney mounted a series of objections to these questions, arguing that the alleged contract is a nullity under 25 U.S.C. § 81. It was decided that the parties would address the issue, if at all, in the posthearing briefs (Tr. 142-145, 163). No party has chosen to do so.

Mr. Strebe testified that he gave Mr. Therieau such a plan. That plan was prepared by Riverside County in connection with Mr. Strebe's application to develop the drive-in theater. He does not know whether or not Mr. Therieau ever gave the plan to the Bureau or the lessor. In any event, he asserts that it did not represent his own plans for the property and he acknowledges that he never submitted any to the Bureau (Tr. 348, 375, 507-517).

Mr. Strebe did not submit a general plan for the development of the entire property within the first 120 days as required by the lease (A.R. tab D). Neither did he submit any such plan within the first 3 years of the lease (A.R. tabs F, I). Nor was any substantial work completed on the drive-in theater by that time. Id. By letter dated September 12, 1962, Mr. Strebe requested more time to comply (A.R. tab G).

An October 1963 newspaper article reported Mr. Strebe's plans to open the drive-in theater within 60 days. It further noted Mr. Strebe's announced plans to combine a shopping center and equestrian facilities with the theater, and to plant some 2,000 trees and shrubs on the property (Lessor's Exh. 15). Nevertheless, the theater was not completed until May 1964 (A.R. tab J; see also Tr. 108-109, 367; A.R. tabs E, F, I). The Bureau prodded Mr. Strebe to submit a general plan in February 1965 (A.R. tab K), March 1965 (A.R. tab L), April 1965 (A.R. tab M), February 1966 (A.R. tab N), and March 1966 (A.R. tab O). No plan was submitted.

After an unexplained hiatus of 8 years, the Bureau again urged Mr. Strebe to submit a general plan in March of 1974 (A.R. tab P). He responded by again asking for more time (A.R. tab Q). In May 1974 the Acting Area Director declared appellant in breach and gave him 10 days to show cause why the lease should not be canceled (A.R. tab T). Mr. Strebe responded that he intended "to move forward on the development of the property * * * [and] will in the near future submit a plan * * *" (A.R. tab S).

By July 15, 1974, no plan had been submitted and so the Acting Area Director issued a letter giving Mr. Strebe 60 days to cure his default or else forfeit the lease (A.R. tab U).

A Mr. John Anderson submitted on Mr. Strebe's behalf a "very rough layout of what we would like to propose" by letter dated August 28, 1974 (A.R. tab V). He requested a 6-month extension within which to cure the default cited in the

Bureau's July 15 notice. A 30-day extension was granted. There is nothing in the record to indicate that any more detailed plans were submitted until at least 1982.

Mr. McDermott (the Bureau's PSO Director from 1972 to 1984) testified that the attempt to force compliance or termination was dropped when appellant demonstrated to the Director's satisfaction that development at that time was not possible: "Mr. John Anderson was an associate of Mr. Strebe and made an extensive effort with the city to obtain zoning and to obtain development and was unable to do so * * *. [T]he zoning was just not to be had" (Tr. 135).

In light of the zoning restrictions and appellant's continuing communication with Mr. McDermott regarding development possibilities (Tr. 170), Mr. McDermott determined that appellant was not then in breach of the good faith clause. 6/ He considered Mr. Strebe's rough plan sufficient to fulfill the Bureau's requirements (Tr. 167-168), even though it lacked any architect's design and even though he did not know whether it had been submitted to lessors for their approval as required by the lease (Tr. 167-168). 7/

When the 1974 termination effort ceased, Mrs. Beverly Diaz, as co-guardian, chose to allow further decisions regarding the lease to await the lessors' attaining their majority. Director McDermott stated that "Ms. Diaz felt that her children were reaching maturity and that the decision should be delayed until they reached maturity, so they would make the decision themselves" (Tr. 137). Mrs. Diaz confirmed:

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6/ "The clause about the good faith attempt, certainly I decided that he was making a good faith attempt and was complying with the requirements of the lease" (Tr. 174).

7/ Mr. McDermott explained his view of development plans in trust land leases as follows:

> Well, whatever plans -- and this happened in many cases -- a preliminary plan was submitted which was never implemented and it was as the development came into being, a new general plan was submitted and it amended the previous plan, so, obviously, that didn't seem too much of a concern to me -- that piece of desert out there. What he might propose in a general plan, was just -- did not take on that importance.

Tr. 175.

I'm pretty sure I said that to Mr. McDermott, for the simple reason that my daughter had turned 18 and I had a son that was going to be 18 soon, so I leave it up to them" (Tr. 455).

Lessor Cummings testified that after attaining majority in 1974, she questioned Curtis Engle of the Palm Springs Office about the upkeep of the leased property (Tr. 469). Although she testified to making many subsequent complaints to the BIA regarding appellant's alleged failure to perform under his lease responsibilities (Tr. 470), it was not until 1981 that she finally employed an attorney to pursue cancellation of the lease (Tr. 480, 490-491).

Even after the Santa Rosa decision appellant continued to regard the City as the zoning authority over the property. He did not seek a change of zoning from either the Tribal Council or the BIA (Tr. 175), despite widespread publicity in Palm Springs about the conflict between the City and the Band over authority to govern trust land (Tr. 163; Lessor's Exh. 1). Nor did he make any formal application to the City for a zoning change or conditional use permit (Tr. 171). However, in the late '70's, when land in the unincorporated county across the street from the leased property began to be developed, Mr. Strebe apparently did make informal inquiry of the City regarding the possibility of similar development, to no avail (Tr. 188-189). In Director McDermott's words,

> The land across the street is in the county, it's not in the city, and the first thing we knew, a 7-11 showed up and then a Yamaha shop and when Mr. Strebe had contacted the city and tried to get some of the same goodies, why, he was turned down.

Tr. 188.

In 1980, the City of Palm Springs rezoned the property M-1, light industrial. In September 1981, and again in December 1981, lessor Cummings requested that the lease be canceled for cause (Declaration Exhs. J, K). A year later, Mr. Strebe had some plans prepared (Appellant's Exhs. 2, 3, 4, 5). These may be the first plans that Mr. Strebe, himself, considered sufficient to comply with Article 4 (Tr. 396-397).

Howard Lapham prepared these plans that were subsequently submitted to lessor Cummings and the Bureau:

Q. [By Mr. Foreman] In preparing the plans that you did for Mr. Strebe, did you form any sort of estimate of how much it would cost to implement those plans?

* * * * * *

A. [By Mr. Lapham] No, we didn't get into the complete performa [sic] cost and going forward with the implementation.

Q. So, you did nothing more than draw the pictures?

A. The conceptional deal and the layout and analyzed it on a preliminary basis, but no formal performa [sic] was ever built.

* * * * * *

Q. Were you asked to provide projections of income for the development described in the plans that you prepared?

A. I don't believe so.

Q. Were you asked to prepare estimates of the cost to implement the development according to the plans that you prepared?

A. I think on a preliminary basis, yes.

Q. What does that mean, on a preliminary basis?

A. Well, based on what's normally costing per unit for putting in recreational vehicle, you know, for the on-side [sic], off-side [sic] improvements and so forth and the landscaping.

Q. And did you prepare such an estimate?

A. I really don't know. I believe I probably did.

Q. Did you provide such an estimate to Mr. Strebe?

A. I don't think so.

* * * * * *

Q. Does this plan contemplate the construction of any sort of flood control or flood abatement facilities as part of this development?

A. We never got that far. * * *

* * * * * *

Q. So, your cost estimate [does not include] any work that would have to be done to make the property developable according to this plan, is that right?

A. Any major drainage problems, no.

Tr. 51-58.

Mr. Strebe conceded that no firm projections accompanied the plans:

Q. [By Mr. Forman] Mr. Strebe, were you asked to provide any information to the Lessor or her attorney in preparation for a meeting in May 1983?

A. [By Mr. Strebe] May of 1983. I am sure we were. If it resulted in our meeting with Mr. Gergely, the attorney. [8/]

Q. Do you recall Mr. Gergely asking you to provide financial projections for the planned development depicted in Mr. Lapham's drawings?

A. I believe so. Yes.

Q. Do you recall Mr. Gergely asking you to provide a time table for the development of the property in accordance with Mr. Lapham's plans?

A. Yes, I believe so.

Q. Did you provide the Lessor with financial projections on the project depicted in Mr. Lapham's plans?

A. Not from the standpoint of a builder or contractor. No.

8/ Mr. Gergely was Mr. Strebe's attorney at this time.

> Q. Did you give any projections of the income that the Lessors might expect to receive from the development in accordance with Mr. Lapham's plans?
>
> A. No. We hadn't gotten to that. No.
>
> Q. Did you provide the Lessors with a time table for the development of the property according to Mr. Lapham's plans?
>
> A. No. We did not. * * *

Tr. 421-422.

In 1983, at the direction of the Acting Sacramento Area Director of BIA, lessor Cummings and her attorney met with appellant, his attorney, and Mr. Lapham (Tr. 481-491). Lessor Cummings testified that she remembered her attorney asking about "certain things, the timetables, architect, the designs" (Tr. 487) and that her attorney "had asked Mr. Strebe for certain--if I can remember--certain stuff that we wanted and he didn't bring them" (Tr. 488). She also recalled that her attorney advised her that these plans might be the best that Mr. Strebe could do for her property (Tr. 486). Nevertheless, she was not satisfied with the plans (Tr. 485, 488).

Appellant acknowledges receiving a letter dated June 13, 1983, from lessor's attorney asserting the plans' shortcomings:

> Because Mr. Strebe was unwilling to offer definite timetables for development, to be bound by timetable, to provide projected income schedules, to propose amendments to the lease regarding minimum annual rentals and other issues, and to bind himself to any other specific terms of development, the proposal which he made was unacceptable to my client. In my phone conversations and correspondence with you [Mr. Gergely] prior to that meeting, I made it clear that there [sic] were the sorts of things that my client would require if Mr. Strebe wanted her to consider any proposal seriously. Since Mr. Strebe refused to provide any of this sort of detailed information other than an extremely general plan for development, his proposal was unsatisfactory to her. My client has had a lease with Mr. Strebe for nearly 25 years during which time Mr. Strebe failed to develop the leased land according to the

> requirements of his written lease agreement. Surely you can understand Mrs. Cummings' hesitancy to rely on oral and indefinite promises of development when Mr. Strebe has failed to fulfil his obligations under a written agreement over such a lengthily [sic] time period.

Appellant's Opening Brief, dated April 15, 1987, at 16, quoting from Strebe's Brief (to the Board in July 1985), Exh. 18. The lease was thereafter canceled by the Area Director, Sacramento Area Office, BIA, effective August 2, 1983 (A.R. tab CC).

II. Determination of the Breach

The lease contemplated development of the entire property, not only to benefit the lessors with the eventual control of significant income producing improvements (see A.R. tab B, lease Article 2(3); Diaz' Brief, Exhs. 2, 15) but also to provide a monthly rental income in excess of the stated minimum (See A.R. tab B, lease Article 2(1) and 2(3); cf. Bonaparte v. Commissioner of Indian Affairs, 9 IBIA 115 (1981) and Siegfried v. Area Director, Billings, 3 IBIA 195 (1974).

Mr. Strebe has been in business in Palm Springs since 1928 (see Lessor's Exh. 15). He also served on the Palm Springs City Council around the time the lease was negotiated (see Tr. 348, 405-406). It is inconceivable that he was not aware of the zoning climate in the area or that he did not anticipate that the property would be restrictively zoned, at least for an initial period of time, upon its annexation.

Whether or not he anticipated any zoning impediments to development of the entire property, he could not have undertaken to develop the property under the lease without first submitting general plans, and such plans were not provided until nearly the end of the initial 25-year lease term.

[3] I find that, under the circumstances of the case, Mr. Strebe has failed to attempt in good faith to complete development of the leased premises. Article 4 of the lease must be considered in pari materia with Article 17 (requiring diligence at all times) and so I find the failure to act in good faith is a continuing breach which commenced in February 1960 and which has continued throughout the term of the lease.

Appellant urges that there is no breach because he did submit plans in 1974 and 1983, which plans were not

disapproved as called for by the lease. His argument is unavailing because the 1974 plan was neither sufficient to meet the requirements of the lease nor submitted to lessors for their approval, and because the 1983 plans were, in fact, disapproved by lessor Cummings.

[4] Appellant urges that the breach is waived by lessors' acceptance of the rent and failure to press for cancellation. Following Sessions, Inc. v. Morton, 348 F. Supp. 694 (C.D. Cal. 1972), aff'd, 491 F.2d 854 (9th Cir. 1974), the Board has held that the question of waiver by acceptance of rent after default is a question of lessor's intent, which is to be determined from the facts of the case. Franks v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 231 (1985); Downtown Properties v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 62 (1984).

The facts here do not evidence a waiver. Lessors' mother, in her capacity as co-guardian, specifically intended to reserve any decision on canceling the lease for lessors on their attainment of majority (Tr. 137, 455). Lessor Cummings, on coming of age, was in frequent communication with the Bureau regarding the inadequacies she perceived in appellant's performance of his lease obligations (Tr. 468-470). Neither lessor Cummings nor the BIA ever withdrew any notice of default (Tr. 189-190). The BIA's acceptance of the City's exercise of zoning over trust property, in light of its own fiduciary duty to protect and further the interests of the allottees, suggests only that the Bureau either regarded the barriers to development as insurmountable or found them the necessary concomitants of a policy choice to utilize other services the City agreed to provide. Such an accommodation may be inferred from Director McDermott's testimony of the Band's attempt to stand up to the City: the Tribal Council "advised the city council that henceforth they were going to zone the Indian lands. The city retaliated and said okay, you set up your own planning department and inspection department and we won't furnish fire and water and so forth * * *" (Tr. 162-163).

[5] Appellant contends that cancellation of the lease is inequitable under California law. The Board has held that leases approved on behalf of Indians by the Secretary of the Interior acting in his fiduciary capacity are governed by Federal law and may be canceled in accordance therewith. Franks, supra, 13 IBIA at 235; accord Sessions, Inc. v. Morton, 348 F. Supp. 694 (C.D. Cal. 1972) aff'd, 491 F.2d 854 (9th Cir. 1974).

Despite appellant's assertions that he has lost money on the property each year (Tr. 423), he has had substantially more than the benefit of his bargain and lessors have had substantially less than the benefit of theirs. Mr. Strebe has tied up the property awaiting a time when it could be developed to his advantage while lessors have received no more than the minimum rent:

> I'm a great believer of not tying up property with poor usage, and then when somebody comes along with a higher and better usage, a good usage, I feel the property should be used. I presently own quite a bit of real estate that I have sat on for 20, 30, 40 years that hasn't been developed to its fullest use.

Tr. 404.

Lessors, on the other hand, have been substantially harmed not only by the loss of income over 20-some years, but also by the absence of any income producing improvement to their property. Downtown Properties, Inc, v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 62 (1984); Small v. Commissioner of Indian Affairs, 8 IBIA 18 (1980).

III. Propriety of Termination

A determination that lessor is in breach does not, by itself, resolve the question of whether or not the lease termination was proper; rather, an analysis of applicable contract and statutory provisions is required. Article 15 of the lease makes forfeiture a remedy that may be exercised at the option of lessors for lessee's uncured breaches of 60 days' standing. Lessors must give lessee written notice of default and a period of 60 days during which lessee has the right to cure the breach or, where the breach cannot be cured within 60 days, to reasonably begin and continuously carry on its cure. If lessee fails to do so, lessors may then declare lessee's rights under the lease forfeited. Nothing in this provision is incompatible with the applicable Federal regulation found at 25 CFR 162.14, which requires a 10-day show cause notification detailing the nature of the alleged breach followed by a reasonable time for cure

or a determination that the breach is correctable. 9/ Nor does the existence of a regulatory remedy preempt relief under the contract. "Part 131 of Title 25 of the Code of Federal Regulations does not purport to specify in detail the provisions to be included in any lease of Indian lands, and CFR § 131.14 does not purport to specify an exclusive method for cancelling leases." 10/ Yavapai-Prescott Indian Tribe v. Watt, 528 F.Supp 695, 698 (D. Ariz. 1981), rev'd on other grounds, 707 F.2d 1072 (9th Cir. 1983). Accord Racquet Drive Estates, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 192, 90 I.D. 243, 248 (1983).

However, "[w]here the terms of the lease set forth specific revocation or cancellation procedures, such terms are binding on the parties, including BIA in its capacity as trustee." Patencio v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 92, 98 (1986). As in the present appeal, the lease in that case provided a 60 day period after determination of breach for lessee to effect a cure.

On June 30, 1960, the Bureau gave Mr. Strebe 10 days within which to show cause why the lease should not be canceled (A.R. tab D). On May 28, 1974, the Bureau again gave Mr. Strebe 10 days within which to show cause why the lease should not be canceled (A.R. tab R). On July 15, 1974, the Bureau gave Mr. Strebe 60 days within which to cure his

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9/ 25 CFR 162.14 states in relevant part:

> Upon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part, the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled. * * * If within that ten day-period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach.

10/ 25 CFR Part 131 has been renumbered without substantive change at 25 CFR Part 162. 47 FR 13327 (Mar. 30, 1982).

defaults (A.R. tab U), which time was extended by 30 days (A.R. tab V). Mr. Strebe never complied with these orders, nor were they ever withdrawn.

On March 11, 1983, the Bureau gave Mr. Strebe 60 days within which to finalize and submit to PSO an agreement with lessors for the development of the property. The parties met on May 3, 1983; no agreement was reached. On August 2, 1983, the Bureau sent Mr. Strebe notice that his lease was canceled.

Appellant urges that the lease cannot be canceled without affording him a period of 60 days specifically within which to cure any default. Although the March 11 notice gave lessee 60 days within which to arrive at an agreement regarding the undeveloped 30 acres, it is arguable that the language is ambiguous because the 60 days was given "rather than take action to cancel the lease in its entirety" (A.R. tab BB; emphasis added). Mr. Strebe contends that he might reasonably assume he would have a 60-day period of time following the failure to agree within which to cure any default.

Were it not for Mr. Strebe's repeated delays and long-standing failure to comply with the terms of the lease, this argument might be accepted as reasonable. Even so,

> When the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one "reasonable" choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe. In short, he cannot escape his role as trustee by donning the mantle of administrator, * * *.

Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1567 (10th Cir. 1984), dissenting opinion adopted as majority opinion by the court en banc, 782 F.2d 855 (10th Cir. 1986), supplemented in other respects by 793 F.2d 1171 (10th Cir. 1986), cert. denied sub nom. by Southern Union Company v. Jicarilla Apache Tribe (No. 86-219), Southland Royalty Company v. Jicarilla Apache Tribe (No. 86-224), Exxon Corporation v. Jicarilla Apache Tribe (No. 86-225), and Unicon Producing Company v. Jicarilla Apache Tribe (No. 86-226), 479 U.S. 970, 107 S.Ct. 471-472 (1986). Therefore I conclude that the cancellation of lease No. PSL-24 was proper.

[6] The March 11 letter (A.R. tab BB) did give Mr. Strebe written notice of his default and a period of 60 days thereafter within which to submit an agreeable plan for its cure, all in accordance with Article 15 of the lease. Cf. Patencio, supra, 14 IBIA at 98 (Area Director's decision reversed because it gave no opportunity to cure). Furthermore, the breach in this case is so substantial that it is reasonable to conclude that it could not have been cured within the term of the lease. Downtown Properties, supra, 13 IBIA 67 (1984); cf. Patencio, supra, 14 IBIA at 97-98 (lessee "substantially complied" with the lease).

In fact, appellant presented no plans at the February 1987 hearing that were any more recent or more refined than those presented to lessor at the May 3, 1983, meeting. Those plans were specifically disapproved by lessor Cummings for their inadequacies. Moreover, appellant's testimony suggests his own doubt that the property can presently be developed:

> Had in '81 or '82, had we been able to have gone ahead, I am sure through the Indian Planning Council whom I got to know pretty well, I am sure we could have accomplished something good, but since that time, since '81 or '82, whenever it was, the property has been frozen. I have not been able to do anything to develop the property which is sad. This town as a whole, is a fragile area. It is up one day and gone the next day. It looks good tomorrow and looks bad the following day. Right now conditions are not good in this Valley at all. There are many places that are in deep trouble financially in this Valley -- * * *.

Tr. 436 (emphasis added).

## Conclusion

Appellant has been given repeated notices of his default in presenting plans and prosecuting development of the entire property. He has had more than ample opportunity to cure his default pursuant to Article 15 of the lease, or to show cause why the lease should not be canceled in accordance with 25 CFR 162.14. The default has not been cured nor has appellant shown, at the hearing, that there is even a reasonable possibility that it can be cured in the foreseeable future. I would therefore affirm the respondent's cancellation of the lease.

Arthur W. Diaz, Jr., has been notified of these proceedings and has had ample opportunity to represent his interests, if different from those of Ms. Cummings, his co-lessor. Because 25 CFR 162.14 requires the Secretary to undertake cancellation proceedings in his capacity as trustee "[u]pon a showing satisfactory to the Secretary that there has been a violation of the lease * * *," the fact that cancellation will extinguish Mr. Diaz's interests under the lease should not act to prohibit termination. The purpose of the lease was to develop the property as a whole in the best interest of the allottees. Partition of their respective interests would not further that purpose.

Right to File Exceptions

Within 30 days fro m receipt of this recommended decision, any party hereto may file with the Board any exceptions or other comments regarding the recommended decision. Strebe 14 IBIA at 117; 43 CFR 4.338(b), 4.339.

Harvey C. Sweitzer
Administrative Law Judge